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No. 91-1521

In The

Supreme Court of the United States

OCTOBER TERM, 1991

UNITED STATES OF AMERICA,
Petitioner,

v.

LOWELL GREEN,
Respondent.

On Writ of Certiorari to the District of Columbia Court of Appeals

BRIEF OF THE DISTRICT OF COLUMBIA, *AMICUS CURIAE*, IN SUPPORT OF REVERSAL

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INTEREST OF THE DISTRICT OF COLUMBIA, *AMICUS CURIAE*

The District of Columbia appears as *amicus curiae* because the criminal offenses with which respondent is charged are violations of District of Columbia law and because the investigative procedures at issue are those that were used by District of Columbia police, members of the Metropolitan Police Department. Despite the District's close involvement in investigation of the murder of which respondent is accused, it is not a party to this litigation because the Congress has not delegated to it the authority to prosecute felonies or serious misdemeanors that violate District law. Authority for such prosecutions remains in the United States rather than in the people of the District of Columbia.

The interest of the District of Columbia is in the effective investigation and resolution of serious crimes committed by repeat offenders and in establishing that police investigators may initiate custodial questioning of an accused about a new crime as

long as they adequately warn him of his right to remain silent and to request counsel, and the accused waives those rights, aware that his decision not to discuss the earlier crime without counsel had been fully honored. The decision below hampers criminal investigations of serious crimes, committed by repeat offenders. It does so without benefit to the accused even after he is informed of the right to counsel and the right to choose between speech and silence.

STATEMENT OF THE CASE

On July 18, 1989, District of Columbia Metropolitan Police Department officers arrested respondent on drug charges. The officers gave him a printed advice-of-rights form. In response to the printed question whether he was willing to talk to the police without having an attorney present, respondent wrote "No." The officers did not attempt to question him. (App. 2a).

Respondent appeared in court the following day, and an attorney was appointed to represent him. On July 28, 1989, the drug charges were dismissed at the preliminary hearing but respondent remained in custody on an unrelated juvenile matter. (App. 2a).

In August 1989, a grand jury indicted respondent on charges of possessing a controlled substance with intent to distribute it, the offense for which he had been arrested in July. On September 27, 1989, after consultation with the lawyer appointed for him on July 19, respondent entered a plea of guilty to the lesser included offense of attempted possession of a controlled substance with intent to distribute it. (App. 2a).

On January 4, 1990, while respondent remained in custody, without bond and awaiting sentencing on the drug charge, a Metropolitan Police Department detective obtained an arrest warrant charging respondent with the 1988 murder of Cheaver Herriott, a crime unrelated to the drug charge. The next day, officers brought respondent to the police department's homicide office for booking. The officers advised respondent of his right

to obtain counsel and to remain silent, and he agreed to waive those rights. Respondent discussed his involvement in the murder of Herriott with the officers, and they again advised him of his rights. Respondent then made a videotaped statement in which he confessed to his involvement in the robbery and murder. (App. 3a).[1]

Respondent was indicted for murder. He moved to suppress his confession, claiming that it had been obtained in violation of *Edwards v. Arizona*, 451 U.S. 477 (1981). The trial court ordered that respondent's confession be suppressed. (App. 31a–33a.)[2]

The District of Columbia Court of Appeals affirmed based principally on *Edwards v. Arizona*, 451 U.S. 477 (1981), and *Arizona v. Roberson*, 486 U.S. 675 (1988). The Court of Appeals ruled that once respondent had invoked his right to counsel on the drug charge, he could not waive that right in subsequent police-initiated interrogation on the unrelated murder charge.

SUMMARY OF THE ARGUMENT

The prophylactic rules that have been created to safeguard those in *Miranda v. Arizona*, 384 U.S. 436 (1986), provide insufficient guidance concerning whether the police may initiate questioning of a suspect in custody on an unrelated offense when he has invoked his right to counsel in questioning on the offense for which he is being held. The Court should adopt the following bright line to guide police-initiated questioning of suspects who have invoked their right to counsel in questioning concerning the offense for which they are being held. If the request for counsel has been honored concerning the charged offense, police may administer fresh *Miranda* warnings and may initiate ques-

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[1] About seven weeks later, on February 26, 1990, respondent was sentenced to 15 months' incarceration under the Youth Rehabilitation Act for the drug possession charge. (App. 2a).

[2] The trial court rejected respondent's contentions that his confession was involuntary, and that it was obtained during an unnecessary delay in bringing him to court. (App., 20a–22a, 26a–28a).

tioning concerning an unrelated offense if the questioning is sufficiently separated in time from previous questioning on the charged offense to indicate to the suspect that it indeed concerns an offense different from the one for which he requested counsel. The validity of a waiver of rights during questioning would be determined on the totality of the circumstances.

This test protects exercise of the Fifth Amendment privilege and is fully consistent with *Miranda*. It removes from *Miranda's* prophylactic rules the presumptions that a suspect is unwilling to answer police questions concerning one offense solely because he refused to answer questions concerning an unrelated offense; that he wishes to have counsel in questioning on one offense solely because he requested counsel in questioning on an unrelated offense; and having once invoked his right to counsel in questioning on one offense, his free will would be overborne by that experience when administered *Miranda* warnings in questioning on an unrelated offense. These presumptions have no basis in fact or logic and should not form the basis for *Miranda* prophylactic rules.

A bright line could also be drawn when respondent plead guilty to the drug offense. That plea operated as a waiver of his Fifth Amendment privilege. Since the sole purpose of the prophylactic rules is to protect exercise of the privilege, the rules' protections concerning the drug offense should have ended when respondent's plea was accepted by the court.

ARGUMENT

WHEN A POLICE-INITIATED CUSTODIAL INTERROGATION RELATES TO A DIFFERENT OFFENSE FROM THE ONE CONCERNING WHICH THE SUSPECT PREVIOUSLY REQUESTED COUNSEL, AND THE INTERROGATION IS SUFFICIENTLY SEPARATED IN TIME TO UNDERSCORE TO THE SUSPECT THAT IT INDEED CONCERNS AN OFFENSE DIFFERENT FROM THE ONE FOR WHICH HE REQUESTED COUNSEL, THE INTERROGATION DOES NOT VIOLATE THE FIFTH AMENDMENT IF THE SUSPECT IS AGAIN PROVIDED *Miranda* WARNINGS AND HIS PREVIOUS REQUEST FOR COUNSEL WAS HONORED; THIS IS ESPECIALLY TRUE WHEN THE SUSPECT HAS PLEAD OR BEEN ADJUDICATED GUILTY OF THE FIRST OFFENSE.

No constitutional interest or right is served by the court of appeals' decision, which suppresses a confession that was not obtained in violation of Fifth Amendment rights, and which curtails effective law enforcement by preventing police officers from questioning repeat offenders concerning suspected crimes simply because they are in custody on unrelated offenses for which counsel has been requested.

The court of appeals misconstrued this Court's decisions to hold that, where a suspect asks for the assistance of counsel in dealing with custodial interrogation that immediately follows an arrest, the suspect cannot thereafter waive his right to counsel in any police-initiated interrogation as long as he is held in continuous custody. The court of appeals held that waiver is impossible no matter how long the custody continues, no matter what the disposition of the initial charges on which the suspect was arrested, no matter how unrelated the subsequent questioning is to the initial charges, and no matter how remote in time and circumstances the subsequent questioning is from that which occurred at the initial arrest. Here, suppression was ordered even though counsel had been appointed for respondent following the initial request and the prosecution of the drug charge had run its course, ending in a plea of guilty, three months before the interrogation and resulting confession to murder.

Neither the protection embodied in the Fifth Amendment privilege against self-incrimination nor this Court's precedents shaping the contours of that protection justify discarding a knowing, intelligent, and uncoerced statement, given after administering *Miranda* warnings before questioning on the new offense. Certainly, where the suspect has confessed to the offense for which

counsel was requested, or the prosecution of that offense has run its course with a plea or finding of guilty, there is no justification for making his initial request for counsel applicable to questioning on unrelated offenses.

A.

In *Miranda u. Arizona*, 384 U.S. 436, 460–461 (1966), the Court made the Fifth Amendment privilege against compelled self-incrimination applicable to custodial interrogation by the police.[3] The Court required that police administer the now familiar warnings, which are not themselves required by the Constitution but are deemed necessary to protect exercise of the privilege in the inherently coercive atmosphere of custodial interrogation in a police dominated setting. *Id.* at 467. The Court held that prior to any custodial interrogation, a suspect must be advised that "he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." *Id.* at 444, 467–473.

The "fundamental purpose" of these prophylactic rules is "to assure that *the individual's right to choose* between speech and silence remains unfettered throughout the [custodial] interrogation process." *Connecticut u. Barrett*, 479 U.S. 523, 528 (1987), *quoting Miranda, supra*, 384 U.S. at 469; emphasis in *Barrett*.[4]

[3]Prior to *Miranda*, the admissibility of an accused's statements while in custody was judged solely on whether they were "voluntary" within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment. *Oregon u. Elstad*, 470 U.S. 298, 304 (1985).

[4]In keeping with the fundamental purpose of unfettered choice, the Court has made clear that the Fifth Amendment privilege against compulsory self-incrimination and the related right to have counsel present during custodial interrogation are not self-executing. *Moran u. Burbine*, 475 U.S. 412, 433 n. 4 (1986). (*Miranda* did not create a right to the presence of an attorney "that is triggered automatically by the initiation of the interrogation itself"). Instead, the basic requirement is that the accused must " actually invoke[ ] his right to counsel" by "stat[ing] that he wants an attorney." *Smith u. Illinois*, 469 U.S. 91, 95 & n. 2 (1984); *Michigan u. Mosley*, 423 U.S. 96, 104 n. 10 (1975).

A suspect must make "an initial election as to whether he will face the State's officers during questioning with the aid of counsel, or go it alone." *Patterson u. Illinois*, 487 U.S. 285, 291 (1988). If the suspect " 'knowingly and intelligently' pursues the latter course," there is "no reason why the uncounseled statements he then makes must be excluded at his trial." *Id.*

In subsequent cases, the Court adopted additional prophylactic rules that elaborate on the *Miranda* rules. In *Edwards u. Arizona*, 451 U.S. 477 (1981), the Court held that once a suspect invokes his right to counsel, he "is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." *Id.* at 484–485. In *Arizona u. Roberson*, 486 U.S. 675 (1988), the Court extended the principle of *Edwards* to interrogations conducted in the course of separate investigations, holding that a suspect's request for counsel bars subsequent police-initiated custodial interrogation of a suspect on any subject. *Id.* at 683–685.[5] And in *Minnick u. Mississippi*, 111 S. Ct. 486 (1990), the Court concluded that permitting a suspect who has requested counsel merely to consult with his attorney before the police conduct further interrogation does not satisfy the *Edwards* rule. The Court held that "when counsel is requested, interrogation must cease, and officials may not reinitiate interrogation without counsel present, whether or not the accused has consulted with his attorney." *Id.* at 491.

[5]The Court explained this holding by saying that the Fifth Amendment right against self-incrimination is not offense specific. *Arizona v. Roberson, supra*, 486 U.S. at 685; *McNeil v. Wisconsin*, 111 S. Ct. 2204, 2208 (1991). But certainly that does not mean that the right cannot, and does not, operate independently when unrelated offenses are involved. Respondent would not lose his Fifth Amendment right regarding either the murder or the drug offense by a guilty plea or a confession to one of the offenses but not to the other. Similarly, respondent could choose to waive *Miranda* rights as to one, but not the other, of these unrelated offenses.

The purpose of the *Edwards* right to counsel rule is to protect an accused in police custody from being "badgered" by police officers in the manner in which Edwards was. *Oregon v. Bradshaw*, 462 U.S. 1039, 1044 (1983) (plurality opinion); *Michigan v. Harvey*, 494 U.S. 344, 350 (1990). The *Edwards* right to counsel may be waived when the accused initiates a dialogue with the police and a knowing and intelligent waiver can be found from the totality of the circumstances. *Edwards*, 451 U.S. at 485–86 & n. 9; *Wyrick v. Fields*, 459 U.S. 42, 46–57 (1982) *(per curiam)*; *Oregon v. Bradshaw*, 462 U.S. 1039 (1983).

Although there is language in *Edwards*, in *Roberson*, and in *Minnick* (language quoted above), which arguably supports the court of appeals' decision here, it was serious error to extract from those decisions the extraordinarily broad principle that by requesting counsel in the questioning that immediately follows arrest, a suspect, during a continuous period of custody, cannot knowingly waive his right to counsel in police-initiated questioning concerning unrelated offenses. Each of these cases dealt with pre-arraignment questioning and requests for counsel that followed within days of the arrest. In *Edwards*, only one day had elapsed between the suspect's invocation of the right to counsel and reinitiation of the interrogation. 451 U.S. at 478–479. In both *Minnick* and *Roberson*, the period had been three days. 111 S. Ct. at 188–499; 486 U.S. at 687. *Edwards* and *Minnick* dealt with resumption of questioning on the same offense. And in *Roberson*, questioning concerning the unrelated offense apparently occurred on the same day or days the suspect was being questioned, in disregard to his request for counsel, on the charge for which he was arrested.

The court of appeals' ruling is also inconsistent with the purpose of the *Miranda* warnings, which is "to assure that the individual's right to choose between speech and silence remains unfettered." *Miranda, supra*, 384 U.S. at 469; *Connecticut v. Barrett, supra*, 479 U.S. at 528; *see also, Patterson v. Illinois, supra*, 487 U.S. at 291 (suspect must make "initial election"). The Court

would remove this element of choice if it were to presume (as the court of appeals ruled it has) that a request for counsel immediately following arrest forecloses any police-initiated interrogation during the suspect's continuous custody, no matter how remote in time or subject from that at the initial arrest. Such a doctrinaire approach is inconsistent with the dual principles of requiring a suspect to choose between speech and silence and of "knowing and intelligent waiver" that undergird the promulgation of the *Miranda* warnings. *Miranda, supra*, 384 U.S. at 375–376; *Johnson v. Zerbst*, 304 U.S. 458 (1938).

B.

There is no logical basis to presume that when a suspect invokes his right to counsel during custodial questioning relating to one offense, he in fact intends to invoke it also for different custodial interrogation on a separate offense. In fact, a suspect might be quite willing to respond to questioning relating to one offense but may wish to remain silent or have counsel relating to a separate one. There is also no logical basis for presuming that where a suspect invokes his right to counsel in questioning on one offense, the experience of having done so will overbear his free will and make him incapable of requesting counsel during separate interrogation on an unrelated offense. In fact, common experience indicates precisely the opposite. If he asked for counsel once following *Miranda* warnings and counsel was furnished, he is perfectly capable of also making a choice as to his need for counsel in separate questioning on an unrelated offense, assuming he is properly warned.

These presumptions, which are contrary to fact and to logic, will be built into the edifice of prophylactic *Miranda* rights if the judgment in this case is affirmed. The incremental benefit of doing so to the protection of constitutional rights is minimal, since *Miranda* warnings give all the protection that a suspect needs in order to invoke his Fifth Amendment privilege. However, the cost to effective law enforcement would be great, be-

cause it will mean that repeat offenders who have invoked their right to counsel on one offense will be unapproachable by police on any other offense during continued custody.

Clearly, a test can be devised which meets the legitimate needs of law enforcement and fully protects the rights of suspects. The test we propose and which we believe is most fully consistent with *Miranda* is as follows: When the police-initiated custodial interrogation relates to a different offense from the one concerning which the suspect previously requested counsel, and the interrogation is sufficiently separated in time to underscore to the suspect that it indeed concerns an offense different from the one for which he requested counsel, the interrogation does not violate *Edwards* if the request for counsel for the first crime was honored, and if the police again administer *Miranda* warnings.[6] In these circumstances, the administration of *Miranda* warnings fully protects the suspect. *Cf. Oregon v. Elstad, supra,* 470 U.S. at 317–18. These warnings are the same warnings he was given concerning the first offense, and the efficacy of which he became aware when counsel was provided.

The bright line that we propose is quite close to the *Edwards* rule, as it was refined in the subsequent decisions in *Oregon v. Bradshaw, supra,* and in *Wyrick v. Fields, supra. Edwards* dealt with resumption of uncounseled questioning for the offense concerning which the suspect invoked his right to counsel. In *Bradshaw* the plurality ruled that the suspect initiated conversation under *Edwards* by "evinc[ing] a willingness and a desire for a generalized discussion about the investigation," when he asked "[w]ell what is going to happen to me now." 462 U.S. at 1042, 1045–1046. The question then was whether, under the totality of the circumstances that included fresh *Miranda* warnings, there was a knowing and intelligent waiver of *Miranda* rights. *Id.* at

[6]In *Arizona v. Roberson, supra,* police did not honor the request for counsel relating to the first offense and they did not discontinue questioning when counsel was requested. Questioning concerning the second or unrelated offense was initiated on the same day that police interrogated the suspect concerning the first offense. *See id.* at 686 and nn. 6 & 7.

1045–1046. The concurring opinion would have decided the case solely under the second step of the analysis. *Id.* at 1051 (Powell, J., concurring in the judgment) ("Courts should engage in more substantive inquiries than 'who said what first.' ").

The bright line we propose relates to questioning on unrelated offenses. The requirement that such questioning be sufficiently separate in time from the previous questioning so as to underscore to the suspect that it concerns a different offense offers at least as much protection to the suspect as the first step of the two-step *Edwards/Bradshaw* test, where the request for counsel for the first offense was met. Moreover, any questioning on the unrelated offense would follow fresh *Miranda* warnings, and the validity of a waiver of those rights would be determined on the totality of the circumstances. *Edwards, supra,* 451 U.S. at 486, n. 9; *Wyrick v. Fields, supra,* 459 U.S. at 47.

C.

If, however, the court of appeals had been correct in ruling that *Edwards* precludes police-initiated interrogation that is as remote in time and subject matter as occurred here, the confession still should not have been suppressed. Respondent's invocation of his *Edwards* right to have counsel present during custodial interrogation had no continuing effect after his plea of guilty to the drug charge—the charge on which he had invoked the right. The plea of guilty was "an admission to all of the elements" of the offense and "simultaneously waiv[ed] several constitutional rights, including *his privilege against compulsory self incrimination,* his right to trial by jury, and his right to confront his accusers." *McCarthy v. United States,* 394 U.S. 459, 466 (1969) (emphasis added; footnote omitted). Such a plea "is more than a confession which admits that the accused did various acts; it is itself a conviction; nothing remains but to give judgment and determine punishment." *Boykin v. Alabama,* 395 U.S. 238, 242 (1969). The guilty plea is "a break in the chain of events which has preceded it in the criminal process" and precludes the defendant even from "rais[ing] independent claims relating to the de-

privation of constitutional rights that occurred prior to" the plea. *Tollett v. Henderson*, 411 U.S. 258, 267 (1973).[7]

When respondent waived his Fifth Amendment privilege by his plea of guilty to the drug charge his rights to counsel under *Edwards* necessarily evaporated. The fundamental purpose of the prophylactic rule of *Edwards*, like all such rules under *Miranda*, is to protect the accused's exercise of his privilege against compulsory self-incrimination. *New York v. Quarles*, 467 U.S. 649, 654 (1984). In ruling otherwise, the court of appeals relied on a presumed *Edwards* right "to communicate with the police only through counsel" throughout his custody. (App. 14a). *Edwards* established no such independent right; its only function is to protect the Fifth Amendment privilege. And that privilege was waived when respondent elected to plead guilty.[8]

This necessarily meant that three and one-half months later, when confronted with the murder charge, respondent had the "initial election" to request counsel during questioning or to "go it alone." *Patterson v. Illinois, supra*, 487 U.S. at 291. And his confession to murder, following *Miranda* warnings was not in violation of his constitutional rights or of any rights provided by the prophylactic rules.

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[7]The Superior Court Criminal Rules, which are nearly identical to the Federal Rules of Criminal procedure, require that the court inform the defendant that his guilty plea is also a waiver of his privilege against self-incrimination. It is mandatory that a defendant be informed prior to his plea that he has a Fifth Amendment right against compelled self-incrimination. D.C. Super. Ct. Crim. Rule 11(c)(3). A defendant must also be informed that he may be questioned by the court about his involvement in the offense to which he is pleading guilty, and that his answers can in certain circumstances be used against him in subsequent criminal proceedings. D.C. Super. Ct. Crim. Rules 11 (c)(5), 11(e)(4).

[8]Although respondent asserts that a guilty plea should not be regarded as sufficient to allow waiver of the right to counsel in police-initiated questioning on an unrelated offense following fresh *Miranda* warnings, he acknowledges that waiver become constitutionally acceptable after sentencing on the first offense. (Br. in opp. at 13-14). Until sentencing, respondent argues, a suspect can ask to withdraw his plea. A guilty plea, however, is a public admission of every element of an offense and of the facts which undergird each element. There is no assurance that the plea, especially when entered with advice of counsel, will be allowed to be withdrawn. Even if withdrawal is permitted, once a suspect has publicly waived his right against self-incrimination in the criminal prosecution for which he requested counsel, there is no doctrinal reason why he should be precluded from making a similar waiver with respect to an unrelated offense if given a fresh opportunity to request counsel or to remain silent. In any event, if existence of the option of requesting withdrawal of a guilty plea has the significance respondent urges, the *Edwards* rule certainly should not survive sentencing.

CONCLUSION

The order suppressing the confession should be vacated.

Respectfully submitted,

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